Office Supreme Court, U.S.
FILED
OCT 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-25

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALBERT A. JONES, ET AL., PETITIONERS

v.

RICHARD S. SCHWEIKER,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Secretary of Health and Human Services, in applying state intestacy laws that are incorporated by reference into provisions of the Social Security Act governing illegitimate children's eligibility for benefits, must take into account claims that the state laws are unconstitutional.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-53a) is reported at 668 F. 2d 755. The opinions of the district court (Pet. App. 54a-66a, 69a-80a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1981 (Pet. App. 1a), and a petition for rehearing was denied on April 5, 1982 (Pet. App. 136a-137a). The petition for a writ of certiorari was filed on July 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are illegitimate children, or persons claiming on their behalf, who applied to the Secretary of Health and Human Services for survivor's benefits under the Social Security Act. The father of the Jones children, an insured under the Act, was domiciled in Mississippi when he died in

1975; the insured father of the Simms child was domiciled in West Virginia when he died in 1971. The Jones petitioners applied for benefits in 1976; the Simms petitioners, in August 1977.

Under the Social Security Act, unmarried minor children of a deceased insured receive survivor's benefits if they qualify under the statute as dependents. 42 U.S.C. 402(d)(1). A legitimate or legally adopted child of the insured is deemed dependent and is entitled to benefits. 42 U.S.C. 402(d)(3). An illegitimate child can establish dependency by showing that the insured was living with him and contributing to his support at the time of the insured's death. 42 U.S.C. 416(h)(3)(C)(ii). Alternatively, an illegitimate child can establish dependency by showing that his parents married but their marriage was inadvertently invalid because of a legal impediment (42 U.S.C. 416(h)(2)(B)) or that the insured prior to his death had (a) acknowledged the child as his son or daughter in writing, (b) been decreed by a court to be the child's parent, or (c) been ordered by a court to contribute to the support of the child on the basis of parenthood (42 U.S.C. 416(h)(3)(C)(i)).

In addition, under Section 216(h)(2)(A) of the Social Security Act, 42 U.S.C. 416(h)(2)(A), an illegitimate child is deemed dependent if he would have had the same right as a legitimate child to inherit personal property under "such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which [the] insured * * * was domiciled at the time of his death * * *."

Petitioners base their claim to survivor's benefits upon Section 216(h)(2)(A).[1] They acknowledge that the state statutes in force at the time the insureds died, Miss. Code Ann.

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[1] Petitioners also claimed below that the insureds were contributing to the children's support at the time of their death, but these claims were

§ 91-1-15 (1972) and W. Va. Code Ann. § 42-1-6 (1966), by their terms give an illegitimate child the same right to inherit personal property as a legitimate child only if the illegitimate child's parents married each other and the father acknowledged the child as his own; petitioners concede that those events did not occur in their cases. Thus, if the state statutes were applied according to their terms, petitioners could not claim under Section 216(h)(2)(A).

Petitioners assert, however, that the courts of Mississippi and West Virginia would have declared their states' intestate succession statutes unconstitutional under *Trimble* v. *Gordon*, 430 U.S. 762 (1977), and "permit[ted] illegitimate children to inherit on the same basis as legitimate children" (Pet. 14-16). For that reason, petitioners assert, the Secretary should allow their claims under Section 216(h)(2)(A).

The court of appeals, agreeing with the district court (Pet. App. 65a, 79a), rejected petitioners' contention. The court noted that Congress's purpose in incorporating state law into the Social Security Act was to provide an easily administered means of determining whether, in a particular state, an illegitimate child was likely to have been dependent on the insured (Pet. App. 21a-22a). For this purpose, the court pointed out, the crucial fact was that the state legislature had enacted a particular law; the constitutionality of the law was immaterial (*id.* at 23a-29a). Accordingly, the court ruled, accepting petitioners' contention "would not in any way achieve the purposes which the incorporation by reference into the social security act of the West Virginia and Mississippi statutes was designed to serve" (*id.* at 28a). Judge Bryan, in dissent, discussed the constitutionality of the state statutes at length (*id.* at 42a-50a), concluding that

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rejected by the Administrative Law Judges and both lower courts (see Pet. App. 7a-10a, 62a, 78a) and are not renewed here.

they were unconstitutional, and then asserted that the majority's result "frustrates the congressional purpose" of "mak[ing] certain that the class of children likely to be dependents was as broad as necessary to encompass all legitimate claims" (*id.* at 52a).

DISCUSSION

1. Mississippi has recently enacted a new statute governing intestate succession that expands the rights of illegitimate children. Miss. Code Ann. § 91-1-15 (Cum. Supp. 1982). This statute is explicitly retroactive. Miss. Code Ann. § 91-1-15(2)(d)(ii) (Cum. Supp. 1982). Accordingly, as to the Jones petitioners only, the judgment of the court of appeals should be vacated and the case remanded for further consideration in light of Miss. Code Ann. § 91-1-15 (Cum. Supp. 1982). See Pet. 29-30 n.7.[2]

2.a. Petitioners cannot contend, and apparently do not contend (see, *e.g.*, Pet. 31), that the Secretary violated the Constitution in denying them benefits. To support such a contention, petitioners would have to focus not on Section 216(h)(2)(A) but on the class of illegitimate children excluded from benefits by the Social Security Act *as a whole*, and show that the Constitution prohibits a distinction between that class and all others. No such showing can be made; for example, 42 U.S.C. 416(h)(3)(C)(i)(III), which permits illegitimate children covered by a decree of filiation to receive survivor's benefits, is by itself sufficient to make

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[2]*Cox* v. *Schweicker*, 684 F. 2d 310, 318-319 (5th Cir. 1982), and *Gross* v. *Harris*, 664 F. 2d 667, 669 (8th Cir. 1981), both of which involved claims similar to petitioners', ruled that the state statutes in effect at the time of the insured's death, not subsequent intestate succession statutes, were incorporated in Section 216(h)(2)(A). But in both cases, this ruling was premised on the courts' conclusion that as a matter of state law, the new state statutes were not retroactive. See *Cox* v. *Schweiker, supra*, 684 F. 2d at 318 & n.15; *Gross* v. *Harris, supra*, 664 F. 2d at 669.

the Act constitutional under *Lalli* v. *Lalli*, 439 U.S. 259 (1978). Other provisions of the Act award benefits to many categories of illegitimate children excluded by the New York statute upheld in *Lalli*. Indeed, the illegitimate child whose constitutional claim did not prevail in *Lalli* might well have been eligible for survivor's benefits. Compare 42 U.S.C. 416(h)(3)(C)(i)(I) with 439 U.S. at 262-263.

b. The only issue in this case, therefore, is one of statutory construction. Petitioners' claim is that Congress intended the Secretary to assess the constitutionality of state statutes and alter the administration of Section 216(h)(2)(A) accordingly. This approach, however, would disserve the purposes of Section 216(h)(2)(A) and create substantial practical problems that Congress could not have intended to bring about.

In *Mathews* v. *Lucas*, 427 U.S. 495 (1976), the Court upheld the constitutionality of Section 216(h)(2)(A) and other provisions of the Social Security Act dealing with an illegitimate child's right to survivor's benefits. The Court noted that the reason for the various criteria (see page 2, *supra*) was "to determin[e] * * * dependency" so that the Act would "provid[e] only for those children for whom the loss of the parent is an immediate source of * * * need" (427 U.S. at 507). The Court specifically explained the rationale for Section 216(h)(2)(A):

> [W]here state intestacy law provides that a child may take personal property from a father's estate, it may reasonably be thought that the child will more likely be dependent during the parent's life and at his death. For in its embodiment of the popular view within the jurisdiction of how a parent would have his property devolve among his children in the event of death, without specific directions, such legislation also reflects to

> some degree the popular conception within the jurisdiction of the felt parental obligation to such an "illegitimate" child in other circumstances, and thus something of the likelihood of actual parental support during, as well as after, life.

427 U.S. at 514-515 (footnote omitted). In short, Congress incorporated state law into Section 216(h)(2)(A) because it believed state law to be a reliable index of the local mores concerning a parent's support for an illegitimate child.

The state statute applicable to those who died at the time of the insured's death is a far better reflection of "the popular conception within the jurisdiction of the felt parental obligation" to support an illegitimate child than a constitutional decision of this Court. Moreover, the insureds in this case died in 1971 and 1975; surely this Court's 1977 decision in *Trimble* v. *Gordon, supra*, had far less to do with "the likelihood of actual parental support during the years before 1971 and 1975 than the state statutes applicable at those times. Requiring the Secretary retroactively to modify the state laws to bring them into compliance with *Trimble* would, therefore, thwart, rather than serve, the purposes of Section 216(h)(2)(A).[3]

Petitioners' approach would, in addition, create substantial practical problems in the administration of Section 216(h)(2)(A). Petitioners assert (*e.g.*, Pet. 25) that the West Virginia and Mississippi statutes are clearly invalid. But when Congress enacted Section 216(h)(2)(A), it could not have assumed that every constitutional challenge to a state intestacy law would be simply resolved. Indeed, many issues

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[3]Petitioners may, of course, seek the retroactive amendment or invalidation of their states' intestacy laws in the state legislature or, if permitted, in state court. If the statutes are retroactively modified, petitioners may be eligible for benefits. As we noted, this may already have happened to the Jones petitioners.

in this area have produced sharp divisions and complex analysis in this Court. See, *e.g.*, *Lalli* v. *Lalli, supra; Trimble* v. *Gordon, supra; Labine* v. *Vincent*, 401 U.S. 532 (1971). One of Congress's principal reasons for enacting Section 216(h)(2)(A) and the other criteria of dependency "was obviously to serve administrative convenience" (*Mathews* v. *Lucas, supra*, 427 U.S. at 509). It is implausible to suppose that Congress, in attempting to establish a clear standard that could be easily applied to large numbers of claims, also intended to burden the Secretary with the resolution of difficult constitutional questions.[4]

Moreover, after determining a state statute to be unconstitutional, the Secretary could not decide what rights illegitimate children have until he determined how to sever the unconstitutional features of the statute. Petitioners acknowledge (Pet. 25 n.6) that a constitutional defect might be remedied without granting all illegitimate children the rights of legitimate children. The question of how to construe a state statute once the unconstitutional aspect has been excised is one of state law that even federal courts avoid addressing if possible (see, *e.g.*, *Orr* v. *Orr*, 440 U.S. 268, 272 (1979); *Stanton* v. *Stanton*, 421 U.S. 7, 17-18 (1975)).

Petitioners suggest (Pet. 25 n.6) that in such instances the Secretary should simply permit all illegitimate children to obtain benefits. Indeed, petitioners must adopt this position, for they do not explain how they would be entitled to

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[4]Petitioners also do not specify whether, under their approach, the Secretary and the federal courts reviewing his actions resolve the constitutionality of the state law or predict how a state court would resolve it; in close cases, of course, the answers might be different. We know of no other instance where federal courts or officials are required to predict how a state court would resolve a federal question, and the relationship between the Secretary's own constitutional judgments and the "popular conception within [a local] jurisdiction of felt parental obligation" is surely remote. The possibility that a state constitution might be interpreted to impose requirements beyond those of the federal Constitution could add a further layer of complexity.

benefits if the Secretary "remedied" the alleged unconstitutionality of the Mississippi and West Virginia statutes in a more limited way. But as the court of appeals pointed out (Pet. App. 29a-31a), petitioners' approach would have the paradoxical result that in states that granted intestate succession rights to an unconstitutionally narrow class of illegitimate children, the Secretary would allow survivor's benefits to all illegitimate children; while in a state that complied with the Constitution by granting intestate succession rights to a broader class of illegitimate children (but less than all), the Secretary would not allow survivor's benefits to all. This result is plainly inconsistent with Congress's intention to mirror community practices concerning child support.

3. Petitioners assert (Pet. 16-21) that the decision below conflicts with *Fulton* v. *Harris*, 658 F. 2d 641 (8th Cir. 1981), and *Gross* v. *Harris*, 664 F. 2d 667 (8th Cir. 1981). In *Fulton*, however, the state supreme court had declared the state intestacy statute unconstitutional, and the court of appeals simply required the Secretary to comply with the state court decision (as the court of appeals understood it). *Fulton* is therefore distinguishable from this case. See Pet. App. 13a-14a n.7. See also *id.* at 23a-24a n.17 (distinguishing *Eskra* v. *Morton*, 524 F. 2d 9 (7th Cir. 1975)). The decision below does appear to conflict with *Gross* and with *Cox* v. *Schweiker*, 684 F. 2d 310 (5th Cir. 1982). We nevertheless do not believe that this issue merits review by the Court, at least at this time.

The issue presented by this case has arisen, and the conflict in the circuits has come about, because *Trimble* v. *Gordon* invalidated a common form of intestate succession law. After *Trimble*, it became clear that many states' statutes were unconstitutional, and the states moved at varying speeds to rectify them. The decisions of the Fifth and Eighth

Circuits appear to be a response to these circumstances; it is difficult to believe that those courts would have reached the same result if, in the first case to arise, an applicant sought to require the Secretary to consider a novel and difficult constitutional challenge to a state law.

In any event, it appears that most states by now have attempted to conform their intestate succession statutes to *Trimble*. See Pet. 22-23 & n.5. Petitioners identify only one state beside West Virginia that has not done so. Pet. 22 n.4. The Court's decisions in *Trimble* and *Lalli* v. *Lalli, supra*, give the states clear guidance on what the Constitution requires in this area, so it is unlikely that the new statutes will be vulnerable to any substantial challenge. Consequently, to the extent these new state statutes are retroactive, they wholly resolve the issue presented by this case; even if they are not retroactive, they ensure that the number of claimants able to raise this issue will decline.[5] In part for these reasons, we determined not to seek review of *Gross*.

In sum, because this issue involves only one section of the Social Security Act and is apparently the product of a particular set of historical circumstances, and in the absence of any indication that large numbers of applicants are affected, we believe that review by this Court is not warranted.

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[5]In addition, the application of Section 216(h)(2)(A) necessarily varies from state to state. A conflict among the circuits therefore presents few practical problems to the administration of the Act.

CONCLUSION

As to the Jones petitioners only, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for reconsideration in light of Miss. Code Ann. § 91-1-15 (Cum. Supp. 1982). In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1982

DOJ-1982-10